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Recent Cases in Pennsylvania *by John W. Zatkos, Jr., Esq.*

Employer Must Show Change in Condition to Terminate or Modify Benefits

In *Lewis v. WCAB (Giles & Ransome, Inc.)*, the Pennsylvania Supreme Court overruled the Commonwealth Court's decision to terminate the benefits of a worker who had been injured in 1988. Robert Lewis fell from his truck, injuring his back, and began receiving workers' compensation benefits. In 1990, his employer filed the first of four petitions to terminate his benefits. The fourth petition, filed in 2002, was granted based on the testimony of the Employer's physician, who opined that the acute cervical and lumbosacral spine sprains were cured.

The Pennsylvania Supreme Court ruled that the Employer must demonstrate that a change has taken place in the injured worker's condition. Reviewing the testimony, the Court found that the Employer's doctor had failed to produce medical evidence of a change and that his opinion of the injury was insufficient to terminate benefits.

What does this mean? When seeking to terminate or modify benefits for an injured worker, it falls to the Employer to **prove** there is a **change** in the worker's condition (condition, *not* disability) that merits a termination or modification. The PA Supreme Court followed its ruling in *Kachinsky* and overruled its prior decision in *King*. The mere presentation of a new theory by a physician is insufficient to alter prior rulings. But be aware, this doesn't mean a second

petition cannot be filed, it simply means a physician cannot present an alternate theory.

Cosmetic Measures to Hide a Scar Are Not Considered When Determining a Disfigurement Benefit

In *Curren v. Kmart Corporation*, the Workers Compensation Appeals Board (WCAB) affirmed the Workers' Compensation Judge (WCJ)'s decision to grant the injured worker's claim for disfigurement benefits. Ms. Curren had a 7 inch scar on the back of her neck, visible from at least three feet away and another scar on the front of her neck that was 3-4 inches long. She was awarded 100 weeks of disfigurement benefits for the scar on the back of her neck and 80 weeks for the scar on the front of her neck.

The Employer appealed the verdict as excessive because part of the scar on the back of her neck was under her hairline. The Employer further argued that she could hide the scar with her hair.

The WCAB rejected this argument, noting that the Workers' Compensation Act required scars to be evaluated **without cosmetic measures**. They further found that the benefits awarded were in line with similar awards and upheld the WCJ's ruling.

What does this mean? Disfigurement claims must be evaluated without consideration of any cosmetic measures designed to hide the disfigurement.

Workers' Compensation Act Clear: Section 307 Death Benefits Are Not Subject to Offset for Pension Payments

In *Allegheny Ludlum Corp., Petitioner v. WCAB (Michael Carney, deceased, Pamela Carney, widow)*, the Commonwealth Court affirmed the WCAB's decision, which affirmed the WCJ's decision to grant the review offset of the widow whose husband died in the course of employment with the Employer.

Upon the death of Michael Carney, his widow, Pamela Carney began to receive compensation death benefits, as well as pension benefits. When she received a notice that the Employer was going to offset the pension benefits against the compensation benefits, Mrs. Carney filed a review offset petition, alleging that the pension offset taken against the compensation death benefits was not proper.

The WCJ found no case law, regulations, or language in the Workers' Compensation Act (WCA) to support the Employer's offset. Section 204(a) of the WCA lists the benefits that may be offset and Section 307 benefits are clearly not included. Furthermore, the Court said that a widow's rights to benefits are not derivative of an employee's right to benefits. Section 204(a) discusses offsets for payments received by an employee but does **not** discuss offsets for payments to a claimant who is not an employee.

What does this mean? Section 307 death benefits are not subjected to offsets as written in Section 204(a) of the Workers' Compensation Act. As such, an Employer may not offset pension benefits paid to a surviving spouse against death benefits paid to the spouse. This should apply to Social Security, retirement and pension.

Both Parties Can Submit Evidence Beyond What is Considered in a Utilization Review Hearing

In *Graham v. LOC, Inc.*, the WCAB affirmed the WCJ's decision which found the treatments rendered by the injured worker's doctor were reasonable and necessary. In *Graham*, the reviewing physician found the treatment and medications rendered by the injured worker's physician, Dr. Joseph Thomas, were unreasonable because he had not provided adequate records.

Dr. Thomas provided testimony at a hearing and explained the only piece not sent was a list of prescriptions he had written, which was not a medical record that would normally be included in the injured worker's "hard" file. He also testified that all the prescriptions from 2004 onward were for the injury.

The Employer countered that the WCJ erred in hearing Dr. Thomas' testimony because the doctor had not provided all the records to the reviewing physician. They cited *County of Allegheny v. WCAB (Geisler)* as a precedent. When the WCAB reviewed this case, they decided that *Geisler* was not applicable here, as in the *Geisler* case, **no** records were submitted. In *Graham*, the worker's physician **did** submit records and the Board ruled that during a Utilization Review (UR) petition hearing, either party is free to submit evidence beyond what is considered in the UR process and therefore, Dr. Thomas' testimony was acceptable.

What does this mean? If no records are submitted to the reviewing physician, a WCJ cannot entertain a Claimant's Review Petition, per *Geisler*. However, if the proper records are submitted, either party is free to introduce additional evidence to support a Utilization Review. It is a wise move for an employee to submit any and all evidence to support ongoing treatment, even though it is the employer's burden.

A Utilization Review Must Contain Detailed Explanations of the Reasons for Conclusions

In *Sweigart v. WCAB (Burnham Corporation)*, the Commonwealth Court affirmed in part and reversed in part the WCJ and the WCAB's decision regarding a utilization review (UR) requested by the Employer of the reasonableness and necessity of pain treatments administered to the injured worker by his physician.

The Claimant, Craig Sweigart, sustained a lower back injury on the job. Fourteen years later, the Employer requested a UR to review the reasonableness and necessity of blood patches provided by Mr. Sweigart's physician, Dr. Matthews. Dr. Askin, who submitted the UR, opined that he did not consider the office visits, medications and blood patches necessary. The WCJ agreed, and upon appeal, so did the WCAB.

The Claimant argued that Dr. Askin found his treatment unreasonable solely because alternatives exist. The Commonwealth Court disagreed on this issue. However, the Court *did* find that Dr. Askin's report did not contain a detailed explanation for his conclusions and thus found for the Claimant.

What does this mean? The injured worker does not have to prove his or her care is reasonable or necessary. Rather, it falls upon the Employer to prove the care is unreasonable or unnecessary and detailed explanations must support those conclusions.